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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

THERMON PHILLIPS AND E.B. RICH,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 302 of the Labor Management Relations Act, 29 U.S.C. § 186, prohibits certain employer payments to union representatives, and § 186(d)(2) provides that a person who has made or received a prohibited payment is subject to criminal conviction for a violation of § 186 only upon proof that he "willfully violate[d] this section." The question presented is:

Whether the Eleventh Circuit erred:

(a) in treating the "willfully violates" requirement of § 186(d)(2) as an ambiguous term whose meaning turns on its statutory context and legislative history rather than, like the "willfully violating" requirement at issue in *Ratzlaf v. United States,* 114 S. Ct. 655 (1994), a term of art with a clear and settled meaning; and

(b) in holding that § 186(d)(2)'s "willfully violates" requirement permits a conviction based on a finding of general intent—*viz.*, that acts constituting a violation of § 186 were commited knowingly and intentionally rather than by accident or mistake—with no finding that the defendant knew, or was in reckless disregard of the fact, that those acts constituted a violation of law.

PARTIES

In addition to the parties listed in the caption, USX Corporation was a defendant in the district court and an appellant in the court below.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Thermon Phillips and E.B. Rich respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit in *United States v. Phillips, et al.* (11th Cir. No. 90-7721).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 19 F.3d 1565, and is reproduced in Appendix A (1a-40a). The order of the Eleventh Circuit denying rehearing and denying rehearing *en banc* is reported at 33 F.3d 1384, and is reproduced in Appendix C (43a). The jury instruction of the United

States District Court for the Northern District of Alabama, Southern Division, pertinent here, is unreported and reproduced in Appendix B (41a-42a).

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on May 10, 1994. A timely petition for rehearing was denied on August 9, 1994. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The provisions of Section 302 of the Labor Management Relations Act of 1947, 29 U.S.C. § 186, that are involved are set out in Appendix D (44a-45a).

STATEMENT OF THE CASE

A. Introduction

Section 302 of the Labor Management Relations Act of 1947, 29 U.S.C. § 186 (hereinafter "§ 186") prohibits certain employer payments to union representatives. A criminal violation thereof requires that the Government prove that the defendant "willfully violate[d]" § 186. 29 U.S.C. § 186(d)(2). The issue here is the meaning of the statutory element "willfully violates." The trial court refused to instruct the jury that this element requires proof that the defendants knew, or were in reckless disregard of the fact, that by accepting the employer payment here (in the form of pensions) they were in violation of the substantive provisions of § 186. Instead, the court's jury instruction was that all the jury needed to find was that the defendants "knowingly and intentionally committed acts which constitute the offense charged and that such acts were not committed accidently or by some mistake"—*viz.* that the defendants knowingly and intentionally accepted the pensions. App.

42a. Based on this instruction, the jury convicted Rich and Phillips of felony violations of § 186.[1] The United States Court of Appeals for the Eleventh Circuit affirmed the convictions, upholding the validity of the trial court's instruction.[2] This *certiorari* petition seeks review by this Court of the lower court's interpretation of the phrase "willfully violates" in § 186(d)(2).

B. Statement of Facts

Petitioners Thermon Phillips and E.B. Rich were former employees of the USX Corporation who left USX in 1951 and 1964, respectively, to become union representatives employed by the United Steelworkers of America, AFL-CIO-CLC ("the Union"), the union representing USX employees. App. 4a. Until the Fall of 1984, the long-standing policy of USX had been to grant a leave of absence of up to two years for employees who left USX to become union representatives, during which time the individual on leave would continue to accrue credit under the pension plan USX maintained for its employees. *Id.*

In the Fall of 1984, USX changed its policy to allow Phillips, Rich and certain other former employees of USX who were Union representatives to receive leaves of absence for the entirety of their service with the Union,

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[1] Jurisdiction in the district court was invoked pursuant to 29 U.S.C. § 186(e). Phillips and Rich were each convicted of one substantive violation of 29 U.S.C. § 186, and one count of conspiracy to violate § 186. Rich was acquitted of charges of mail fraud. Co-defendant USX was convicted of two substantive violations of § 186, the conspiracy count, and one criminal violation of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1131.

[2] In addition, based on the same understanding of the phrase "willfully violates," the trial court excluded substantial evidence proffered by Phillips and Rich that, if believed by the jury, would have substantiated their claim that they were unaware, and reasonably so, of the application of § 186 to the pension transaction at issue here. *See infra* at 6-7. The court of appeals also affirmed these rulings. App. 17a n.14.

with attendant pension-service credits. App. 10a-14a. Phillips and Rich, along with four other Union employees, accordingly received from USX retroactive leaves of absence for the period of their service with the Union and, with the attendant pension credits, became eligible immediately to receive pensions from USX. App. 15a. It is the receipt of those pensions that is the basis for Phillips' and Rich's criminal convictions.

The evidence at trial showed that Phillips and Rich had requested the retroactive leaves of absence and consequent pension credits during the course of collective bargaining negotiations with USX in the Fall of 1983. App. 3a. At that time, Phillips and Rich were District Director and Sub-District Director, respectively, of District 36 of the Union, and they were representing the Union in negotiations with USX aimed at achieving a collective bargaining agreement that would permit USX to re-open the Fairfield Steel Mill in Birmingham, Alabama—a facility that USX had closed over a year earlier as a result of massive monetary losses from the facility's operations. The negotiations concluded in an agreement to reopen the Fairfield facility, under terms that involved significant labor cost reductions in comparison to the agreement that had been in effect when the plant had been closed. App. 3a, 9a.

Although the issue of the pensions came up during the 1983 negotiations, the Government's theory at trial was *not* that the pensions were traded for concessions in the collective bargaining agreement or that there was any kind of *quid pro quo* for the pensions. The Government emphasized to the trial court that "[i]t is *not* the theory of the government that the pensions were given in return for any 'concessions' in the agreement"; and the Government argued to the jury that: "We're not taking the position that the pensions were promised or given in exchange for concessions in the Fairfield Works Agreement." R40-9337; *see also* Brief of Appellee United States in the Eleventh Circuit at 107. The prosecutor stated that

Phillips and Rich had "bargained hard" in the Fairfield negotiations, and that they "had no inducement not to bargain hard." R40-9338. Instead, it was the Government's position that the simple fact that Phillips and Rich received the pensions from USX constituted a criminal violation of § 186.

As of 1983 and 1984, when the conduct at issue took place, leaves of absence and pension credits such as those received by Phillips and Rich were common throughout American industry. At that time, no court or government agency had suggested, much less concluded, that such arrangements violate § 186. The then-existing authority was, in fact, to the contrary. *See Monsanto Co. v. Texas City, Texas Metal Trades Council,* Civ. No. H-78-199 (S.D. Tex. March 9, 1978) ("the Court finds and concludes that the legislative intent and judicial interpretation of Section [186] excludes, from the statutory ban on the transfer of money or other things of value from employer to employee representative, the mere acquisition of enhanced pension eligibility vested in an employee on leave of absence for purposes of conducting business on behalf of a union"); *Monsanto Co.*, 68 L.A. 101, 112 (Dworkin, 1977)("The language of [§ 186] does not prohibit an employee on leave of absence for international union business from accruing service credits for pension purposes. * * * It is inconceivable that any court of law would hold otherwise.").

The first case to rule that such pension payments can constitute a § 186 violation came long after Phillips and Rich had received their pension entitlement. *Trailways Lines, Inc. v. Trailways, Inc. Joint Council,* 785 F.2d 101 (3d Cir. 1986), *cert. denied,* 479 U.S. 932 (1986). In dissent, Judge Becker, concluding that such pension payments are covered by the exception in § 186(c)(1) for payments to a union official who is a "former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer,"

pointed out that "similar arrangements are common in collective bargaining agreements and have never before been challenged on the grounds relied upon by the majority. While this fact is certainly not dispositive of the legality of such schemes, it surely suggests that they are legal." *Id.* at 111.[3]

During the course of the trial, Phillips and Rich attempted to introduce a substantial body of evidence, much of which was excluded, to show that at the time they requested and received their retroactive leaves of absence and pensions, neither they, nor any reasonable person in their position, would have had reason to believe that such conduct was unlawful.

Phillips and Rich, and co-defendant USX, called as witnesses two former United States Secretaries of Labor, William Usery and Ray Marshall, to testify as expert witnesses. The trial court refused to allow either witness to testify as to the state of affairs in American industry at the time of the events at issue in the case. R37-7692-94 (Usery); R37-7854-58 (Marshall).

Counsel then submitted written proffers setting forth the testimony that Usery and Marshall were prepared to give. As the proffers reflect, both would have testified that grants by employers of extended leaves of absence with pension credits for union officials were exceedingly common in American industry, including the steel industry, in the years preceding 1984, and that prior to the events at issue in this case, neither the Department of Labor, the Department of Justice, nor any court, had ever suggested that such practices were illegal. Exs. Ct. 29 ¶ 23; 30 ¶ 8. According to Secretary Marshall: "[A]t the time of the operative events in this case, a union official receiving one of these leaves of absence for

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[3] The post-*Trailways* authority is not uniform. *See Toth v. USX Corp.*, 883 F.2d 1297 (7th Cir.), *cert. denied*, 493 U.S. 994 (1989); *Communications Workers of America v. Bell Atlantic Network Serv., Inc.*, 670 F. Supp. 416, 419-20 (D.D.C. 1987).

accrual of pension credit would have been fully justified in thinking that such an accommodation was not at all unusual in the normal affairs of labor-management relations, and further, would have had no reason to believe that such a practice in any way violated the law." Ex. Ct. 30 ¶ 18.

In addition, petitioners proffered a Department of Labor report confirming that it was common for union representatives on leave of absence from a company to continue to accrue company benefits such as pensions, Ex. Def. Phillips 21 at 18, 26, and an opinion letter issued in 1977 by the Office of the Solicitor of Labor that squarely declares that § 186 does not prevent "an employee, who is on a leave of absence without pay from a company in order to serve as a union officer, from receiving retirement credit for the period during which he serves as a union official." Ex. Def. Phillips 12. The proffers were rejected by the trial court.

C. Proceedings Below

Section 186(d)(2) provides that a defendant can be criminally convicted under § 186 only if he "willfully violates" that section. Accordingly, both Phillips and Rich requested that the trial court instruct the jury that the Government was required to prove that the defendants knew, or had reckless disregard for the fact, that their actions were in violation of the substantive provisions of § 186. The trial court rejected that request and instead instructed the jury that the "willfully violates" element requires the Government only to show that the defendants "knowingly and intentionally committed acts which constitute the offense charged and that such acts were not committed accidently or by some mistake." App. 42a. As the Government put it in closing argument to the jury: "When you hear the Judge tomorrow and when you read the charge as to what 'willfully' means, basically all we have to prove is that the defendants were awake [and] * * * that it wasn't a computer error." R41-9576.

Following that instruction, the jury convicted Phillips and Rich of "willfully violat[ing]" § 186. The trial court sentenced Rich to two concurrent terms of 36 months imprisonment, three years of supervised release, and a fine of $6,000, and sentenced Phillips to two concurrent terms of 30 months imprisonment, two years of supervised release, and a fine of $6,000. R43-2934.

On appeal to the Eleventh Circuit, the convictions were upheld. As to the meaning of "willfully violates" in § 186(d)(2), the Eleventh Circuit stated:

> [A]ppellants' reading of the statute is the minority view; the Second, Third, Sixth, and Ninth Circuits all have held that the term "willfully" as used in section 186(d) requires proof only of general intent. [App. 27a (footnote omitted)].

The Eleventh Circuit reviewed the legislative history of the 1984 amendments to § 186 and found that history to be supportive of the interpretation adopted by the circuits listed in the above-quoted passage. App. 29a-37a. The Eleventh Circuit then rationalized its reading of "willfully violates" by pronouncing the conduct of Phillips and Rich to be "inherently wrong," thus implicitly answering the question that was never submitted to the jury and discrediting the evidence that the trial court had withheld from the jury as to whether that conduct, at the time it was done, was reasonably understood to be lawful:

> Neither USX nor Phillips and Rich needed to consult section 186 to determine that their actions, in paying and receiving the pensions, were illegal; they knew these acts were illegal. Section 186 codifies a basic moral tenet: an employer should not bribe a representative of his employees (or make any payments that could be perceived as a bribe), and such a representative should not accept a bribe (or any payment that could be perceived as a bribe). Appellants, of course, knew this. In enacting section 186, Congress simply prohibited people, such as Phillips

and Rich and the USX officials involved in this case, from committing acts that they should know are inherently wrong—whether or not they were aware of the text of section 186 is of no moment. [App. 36a-37a].[4]

A timely petition for rehearing and suggestion of rehearing *en banc* was denied.

REASONS FOR GRANTING THE WRIT

Introduction

Congress, in framing the provisions of the federal criminal law, has returned again and again to a particular formulation of the willfulness requirement: a defendant to be found guilty of the crime in question must be found to have "willfully violated" the statutory legal norm.[5]

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[4] In this regard, the Eleventh Circuit repeatedly characterized the pensions as "kickbacks." We note that no such theory of wrongdoing was ever espoused by the Government or presented to the jury, and that the jury never was asked to, and did not, make any finding that the pensions were given to Phillips and Rich in exchange for concessions of any kind. See *supra* at 4-5.

[5] *See, e.g.*, the following criminal provisions: 2 U.S.C. § 437g (Disclosure of Federal Campaign Funds); 7 U.S.C. § 13 (Commodity Exchanges); 12 U.S.C. § 1957 (Banks and Banking—Financial Record Keeping); 15 U.S.C. § 77x (Securities and Trust Indentures—Domestic Securities): 15 U.S.C. § 80a (Investment Companies and Advisors); 15 U.S.C. § 717t (Natural Gas); 15 U.S.C. § 1674 (Consumer Credit Protection—Restrictions on Garnishment); 15 U.S.C. § 1717 (Commerce and Trade—Interstate Land Sales); 16 U.S.C. § 9a (National Parks—Government of Parks); 16 U.S.C. § 8250 (Public Utilities); 16 U.S.C. § 1417 (Marine Mammal Protection); 18 U.S.C. § 493 (Counterfeiting and Forgery—Bonds and Obligations); 18 U.S.C. § 597 (Elections and Political Activities); 18 U.S.C. § 799 (Espionage and Censorship—Violation of NASA Regulations); 18 U.S.C. § 843 (Importation of Explosive Materials); 18 U.S.C. § 878 (Threats and Extortion Against Foreign Officials); 18 U.S.C. § 923 (Firearms Licensing); 18 U.S.C. § 1735 (Postal Service—Sexually Oriented Advertisements); 22 U.S.C. § 618 (Registration of Foreign Propagandists); 22 U.S.C. § 2778 (Arms Export Controls); 22 U.S.C. § 3104 (International Investment and Trade in Services Survey);

The interpretation of this critical term—which sets the Government's burden in proving *mens rea*—has generated two levels of conflict and confusion in the law. At the first, and most general level, the question is whether "willfully violates" has a single settled plain meaning or a varying contextual meaning. If the latter, at the second level, the question is what is the meaning of the term in the criminal provison covering employer payments to unions and union representatives.

The decision below squarely raises both questions and urgently calls for this Court's review. The question of whether the wide array of federal statutes collected in n.5 *supra* is to be interpreted statute by statute through a close analysis of the structure and legislative history of each enactment, rather than according to the text on its face, is plainly a critical and recurring question that

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26 U.S.C. § 7203 (Internal Revenue Code); 27 U.S.C. § 204 (Federal Alcohol Administration); 29 U.S.C. § 216 (Fair Labor Standards); 29 U.S.C. § 439 (Reporting by Labor Organizations); 29 U.S.C. § 502 (Bonding of Officers and Employees of Labor Organizations); 29 U.S.C. § 522 (Extortionate Picketing); 29 U.S.C. § 626 (Age Discrimination in Employment); 29 U.S.C. § 666 (Occupational Safety and Health); 29 U.S.C. § 1131 (Employee Retirement Income Security Program—Administration and Enforcement); 29 U.S.C. § 1851 (Migrant and Seasonal Agricultural Worker Protection); 31 U.S.C. § 5322 (Records and Reports on Monetary Instruments Transactions); 42 U.S.C. § 6395 (Energy Conservation); 50 U.S.C. App. § 16 (Trading with the Enemy).

See also, e.g., the following civil provisions: 2 U.S.C. § 179f (Library of Congress); 5 U.S.C. App. 4 (Executive Personnel Financial Disclosure Requirements); 7 U.S.C. § 21 (Registered Futures Associations); 7 U.S.C. § 25 (Commodity Exchanges—Private Rights of Action); 12 U.S.C. § 1908 (Banks and Banking—Credit Control); 12 U.S.C. § 2183 (Farm Credit System—Dissolution); 15 U.S.C. § 80b-3 (Registration of Investment Advisers); 15 U.S.C. § 2072 (Consumer Product Safety); 16 U.S.C. § 544m (National Forests); 19 U.S.C. § 81r (Foreign Trade Zones); 22 U.S.C. § 4117 (Foreign Services—Standards of Conduct for Labor Organizations); 29 U.S.C. § 1872 (Management and Seasonal Agricultural Water Protection); 29 U.S.C. § 2617 (Family and Medical Leave).

should not remain unsettled. And, the question of whether the majority rule in the courts of appeals, that "willfully violates" in § 186(d)(2) requires nothing more than a showing of general intent, is a correct reading of that provision also carries with it the most substantial consequences.

Such a reading of § 186 would subject company and union officials in the labor relations sphere to a different rule than that applied under the other statutes containing a "willful violation" requirement: in the former sphere, and only the former sphere, the Government would be required only to prove general intent—the intent showing that is required where Congress does not include a "willful violation" requirement. This important area of economic activity should be separated out for special treatment only if this Court determines that such a deviation from the standard usage of "willfully violates" is truly what Congress intended.

The court below proceeded on the premise that "willfully violates" has no plain meaning, but rather is an ambiguous term whose meaning is to be garnered from the statutory context and, most particularly, its legislative history. Starting from this premise, the court below interpreted "willfully violates this section" in § 186(d)(2) to be nothing more than a requirement that the Government prove that the defendant intended to *take the actions* specified in the substantive provisions of § 186, and not a requirement that the Government prove that the defendant intended to *violate* that legal norm.

The decision below creates the widest possible divide between the meaning of § 186(d)(2)'s "willfully violates" requirement and the uniform judicial interpretation of the same requirement in virtually all of the myriad other federal criminal statutes in which the requirement appears. The decision below, moreover, aligns the Eleventh Circuit with four other circuits—the Second, Third, Sixth, and Ninth Circuits—on this interpretation of § 186(d)(2). Only the Seventh Circuit, albeit in waver-

ing fashion, has sought to bring the interpretation of "willfully violates" in § 186(d)(2) into line with the same requirement in the other federal statutes. The fact that five circuits have so ruled accentuates the schism between the treatment of § 186(d)(2) and the treatment of the other statutes containing a "willful violation" requirement.

The approach of the court of appeals threatens to generate conflict and confusion in an area that we believe this Court should be understood to have stabilized through its decision in *Ratzlaf v. United States*, 114 S. Ct. 655 (1994). Fairly read, *Ratzlaf* stands for the proposition that the phrase "willfully violates"—or its variants, including "willfully violating," the precise phrase at issue in *Ratzlaf*—is a statutory term with a settled plain meaning in criminal law: *viz.*, that the Government "must prove that the defendant acted with knowledge that his conduct was unlawful." *Id.* at 657.[6] Indeed, as the *Ratzlaf* Court said, this settled understanding is *not* subject to variation through "resort to legislative history to cloud a statutory text that is clear." *Id.* at 662.

In contrast, the court below was of the view that *Ratzlaf* authorized it to depart from this "clear" meaning of "willfully violates." On that view, ascertaining the meaning of "willfully violates" calls for an inquiry into each provision's underlying legislative materials—an inquiry that can only unsettle what has heretofore been a quite uniform body of law.

As we develop below, this divided approach to this single term of art is contrary to the apparent sense of the term on its face and to every canon of statutory interpretation, and is, in fact, without any support in § 186's structure or in its legislative history. And, as we have noted, this divided approach puts those charged under

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[6] In the civil context the Court has uniformly interpreted "willfully violates" as requiring proof that the defendant knew, or was in reckless disregard of the fact, that his actions were in violation of the applicable legal norm. See *infra* at 15-16.

§ 186 at far greater jeopardy than those defendants charged with "willfully violating" any of the other federal criminal provisions stating the same requirement.

1. (a) *Ratzlaf* addressed the meaning of the phrase "willfully violating this subchapter" in 31 U.S.C. § 5322 (a). That provision sets out the requirement for criminal enforcement of the statutory prohibition of "structuring" cash transactions for the purpose of evading the obligation of financial institutions to report such transactions in excess of $10,000. In *Ratzlaf*, "[t]he trial judge instructed the jury that the Government had to prove defendant's knowledge of the banks' reporting obligation and his attempt to evade that obligation, but did not have to prove defendant knew the structuring was unlawful." 114 S. Ct. at 657. This Court rejected that instruction as inadequate: "We hold that the 'willfulness' requirement mandates something more. To establish that a defendant 'willfully violat[ed]' the antistructuring law, the Government must prove that the defendant acted with knowledge that his conduct was unlawful." *Id.*

In reaching that result, the Court noted that the construction of "willfully violating" adopted by the lower courts in *Ratzlaf* "treated § 5322(a)'s 'willfulness' requirement essentially as surplusage—as words of no consequence." 114 S. Ct. at 659. That treatment was found wanting since, as *Potter v. United States*, 155 U.S. 438, 446 (1894), states, the "word 'willful' used to describe certain offenses but not others in the same statute 'cannot be regarded as mere surplusage; it means something.' " 114 S. Ct. at 659.

The requisite meaning, *Ratzlaf* found, is that by "subject[ing] to criminal penalties only those 'willfully violating' § 5324," Congress "signal[ed] its intent to require for conviction proof that the defendant knew not only of the bank's duty to report cash transactions in excess of $10,000, but also of his duty not to avoid triggering such a report." 114 S. Ct. at 662. Indeed,

despite "contrary indications in the statute's legislative history," the *Ratzlaf* Court declined to "resort to legislative history to cloud a statutory text that is clear." *Id.* It is also very much to the point that the *Ratzlaf* Court went on to state that had it discerned any ambiguity in the "willfully violating" requirement, the rule of lenity would dictate that the Court "resolve any doubt in favor of the defendant." *Id.* at 663 (citing *Crandon v. United States*, 494 U.S. 152, 160 (1990)).

This recognition that "willfully violating" is a criminal law term of art of unclouded clarity came after the *Ratzlaf* Court had given explicit recognition to the oft-quoted admonition that " '[w]illful,' . . . is a 'word of many meanings,' and 'its construction [is] often . . . influenced by its context.' " 114 S. Ct. at 659 (brackets around "is" in original) (quoting *Spies v. United States*, 317 U.S. 492, 497 (1943)). While the Court's explanation of why the "statutory text" in *Ratzlaf* was nevertheless so "clear" may be cryptic, we submit that the explanation lies in the fact that what was required by the statute there, as here, is proof of a willful *violation, not* the simple proof of a willful *act*.[7]

Particularly against the background provided by the numerous criminal law provisions that are phrased in terms of requiring proof of a willful action, the formulation "willfully violates" carries with it the strongest indication that the legislature intends that the Government prove that the defendant was aware of the legal norm and of his violation of that norm. It stretches language well past

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[7] *Cf. Browder v. United States*, 312 U.S. 335 (1941), cited by the court below for the proposition that "willfully" sometimes can is construed to require only "general intent." App. 24a. The statute in *Browder* did *not* contain a requirement that a defendant must be found to have "willfully *violated*" the statute; it simply required that a *certain action* (the use of a passport secured by the making of a false statement) must have been willfully undertaken. 312 U.S. at 341.

the breaking point to state that one can "willfully violate" a legal norm without knowing of the norm, much less without knowing that his conduct violates that norm.

(b) A "willful violation" requirement is found in a myriad of federal criminal and civil statutes. *See* n.5 *supra*. Invariably—as here and in *Ratzlaf*—the requirement serves to distinguish between a simple violation of a regulatory norm, which is subject to a base level penalty or remedy, and a more serious violation, which is subject to an enhanced penalty or remedy.

Ratzlaf reconfirms this Court's consistent interpretation of the "willful violation" requirement. In the criminal cases prior to *Ratzlaf*, this Court held that to prove a willful violation the Government must prove that the defendant acted with a consciousness of the illegality of his conduct. *See Spurr v. United States*, 174 U.S. 728, 734 (1899) (a "willful violation"—and therefore a criminal violation—of statute prohibiting unlawful certification of a check requires something more than a violation of the statute's prohibition "without any purpose to evade or disobey the mandates of the law"); *Potter v. United States*, 155 U.S. at 445-46 (a willful violation "implies on the part of the [defendant] knowledge and purpose to do wrong").

Similarly, in the civil context, the Court has invariably held that the "willful violation" requirement necessitates proof that the defendant acted with an awareness, or, at the least, acted in reckless disregard of the fact, that his conduct was in violation of the applicable legal norm. *See Hazen Paper Co. v. Biggins*, 113 S. Ct. 1701, 1708 (1993) (a "willful violation" under "two-tiered liability scheme" of Age Discrimination Employment Act requires "knowledge or reckless disregard" of the law); *TWA v. Thurston*, 469 U.S. 111, 127-28 (1985) (same); *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 132-33 (1988) (a "willful violation" under Fair Labor Standards Act justifying three year statute of limitations requires showing that "employer either knew or showed

reckless disregard for the matter of whether its conduct was prohibited by the statute").

By the same token, the case law in the lower federal courts on the "willful violation" requirement in other federal statutes requires proof that the defendant was aware, or, at the least, in reckless disregard of the fact, that his actions were in violation of the applicable legal norm. Virtually every federal statute containing a "willful violation" requirement other than § 186(d)(2), then, has been interpreted to have just the meaning that the court below rejected.[8]

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[8] *See, e.g.*, 22 U.S.C. § 2778(c)—Arms Export Control—*United States v. Golitschek*, 808 F.2d 195, 203 (2d Cir. 1986) (requires knowledge of legal obligation prohibiting defendant's conduct); *United States v. Davis*, 583 F.2d 190, 193 (5th Cir. 1978) (requires proof that defendant knowingly and intentionally violated known legal duty); 30 U.S.C. § 820(d)—Mine Safety—*United States v. Consolidation Coal Co.*, 504 F.2d 1330, 1335 (6th Cir. 1974) (requires determination that defendant intentionally disobeyed safety standard or recklessly disregarded its requirements); *United States v. Jones*, 735 F.2d 785 & n.6 (4th Cir.) (same), *cert. denied*, 469 U.S. 918 (1984); 50 U.S.C. App. § 16(a) (West Supp. 1994)—Trading with the Enemy—*United States v. Macko*, 994 F.2d 1526, 1532-33 (11th Cir. 1993) (requires proof that defendants knew actions were unlawful); *United States v. Tooker*, 957 F.2d 1209 (5th Cir.) (same), *cert. denied*, 113 S. Ct. 187 (1992); 2 U.S.C. § 437(d)(1)(A)—Federal Election Campaign—*AFL-CIO v. Federal Election Comm.*, 628 F.2d 97, 100-02 (D.C. Cir. 1980) (requires knowledge that challenged action was unlawful), *cert. denied*, 449 U.S. 982 (1980); 29 U.S.C. § 666(a)—OSHA—*Brock v. Morello Bros. Construction, Inc.*, 809 F.2d 161, 163-65 (1st Cir. 1987) (requires some form of awareness, not simply of forbidden conduct, but also of statute that forbids it); *Babcock & Wilcox Co. v. OSHRC*, 622 F.2d 1160, 1165-68 (3d Cir. 1980) (requires defiance or such reckless disregard of an action's consequences as to be equivalent to a knowing, conscious, and deliberate flaunting of the Act); *St. Joe Minerals Corp. v. OSHRC*, 647 F.2d 840, 846 (8th Cir. 1981) (act done voluntarily with either intentional disregard of or plain indifference to Act's requirements); 18 U.S.C. § 923(d)(1)(C)—Firearms—*Perri v. BATF*, 637 F.2d 1332, 1334 (9th Cir. 1981) (license denial requires proof that applicant knowingly failed to follow or was indifferent to his legal obligations); *Lewin v. Blumenthal*, 590 F.2d 268 (8th Cir. 1979) (same); *but see Stein's,*

(c) The plain meaning analysis of the "willful violation" requirement that is crystallized in *Ratzlaf* would appear to control this case. Section 186 prohibits certain transfers of "thing[s] of value" from employers to unions or union representatives. Subsections (a), (b), and (c) of § 186 delineate the types of conduct that are prohibited by that section. But such prohibited conduct does not, by itself, constitute a criminal violation of § 186. Rather, the prohibited conduct *simpliciter* is subject only to civil injunctive relief, § 186(e).

Subsection (d), in its turn, defines when such conduct is criminal. Subsection (d)(2)—the part of subsection (d) that is applicable to this case—requires proof of an element *additional* to the elements sufficient to establish a violation of the substantive portions of § 186: the defendant must be shown to have "willfully violate[d]

Inc. v. Blumenthal, 649 F.2d 463, 467 (7th Cir. 1980) (license denial affirmed when applicant had violated record-keeping requirements of act despite repeated warnings from BATF); 27 U.S.C. § 204(e)—Liquor Licensing—*Fedway Assocs., Inc. v. BATF*, 976 F.2d 1416, 1424-25 (D.C. Cir. 1992) (license suspension improper when defendant reasonably believed challenged actions were lawful).

The one statute of which we are aware that has been construed as deviating from this understanding of "willfully violates" is § 32(a) of the Securities and Exchange Act, 15 U.S.C. § 78ff(a). Because, *inter alia*, that section contains a proviso stating that proof that the defendant "had no knowledge of [the] rule or regulation" he violated is a defense only to imprisonment and not to a fine, the Second Circuit has held that fines may be imposed without proof of the defendant's awareness of the legal norm he violated. *United States v. Dixon*, 536 F.2d 1388, 1395, 1397 (2d Cir. 1976). The Second Circuit has acknowledged that, as so construed, in § 32(a) "'willful' has less than its ordinary significance." *Id.* at 1397. "[S]ince the term must have some meaning," *id.* at 1395, the Second Circuit has construed the willfulness requirement in § 32(a) to require proof that the defendant "realiz[ed]] . . . he was doing a wrongful act," *id.*, *viz.*, that he "had *some* evil purpose," *id.* at 1397.

this section." The office of that requirement is to separate violations of § 186 that are merely civil in nature from those that are criminal in nature.

Under the court of appeals' reading, "willfully violates" is nothing more than a general intent requirement—*viz.*, a requirement that the Government prove that the defendant intended to do the *acts* that constitute the offense. But, even in the absence of an express *mens rea* requirement, criminal statutes are presumed to require proof of general intent. *See, e.g., Staples v. United States*, 114 S. Ct. 1793, 1797-98 & n.3 (1994). Thus, the court of appeals' interpretation leaves § 186(d)(2) with precisely the meaning the provision would have if it did not contain a "willfully violates" requirement. The court below, in other words, treated the explicit inclusion of that requirement as "surplusage—as words of no consequence." *Cf., Ratzlaf*, 114 S. Ct. at 659.

(d) The court of appeals did not come to grips with those portions of *Ratzlaf* that directly apply here. That court did not acknowledge that the *Ratzlaf* Court had found the statutory words "willfully violating" to be so "clear" as to preclude "resort to legislative history." 114 S. Ct. at 662. Rather, the court quoted the reference in *Ratzlaf* to "willful," standing alone, having many meanings and then ignored the reasoning and holding of the decision regarding the single, plain meaning of "willfully violating." The court of appeals compounded its error by misquoting a passage from this Court's decision in *Cheek v. United States*, 498 U.S. 192, 200 (1991), to suggest that the " 'traditional rule' is that 'willfully' requires a finding of only general intent." App. 24a.[9]

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[9] The court below went on to indicate that *Cheek* recognized an exception to that "traditional rule" when "willfully" is used in the federal tax statutes. *Id.* In fact, the "traditional rule" referred to in *Cheek* was "[t]he general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution." 498 U.S. at 199. The *Cheek* Court's point was that " 'willfully' as

On that doubly flawed basis, the court of appeals treated "willfully violates" as an ambiguous phrase and embarked on precisely the mode of interpreting such phrases that the *Ratzlaf* Court rejected as improper with respect to the phrase "willfully violating." In so doing, the court of appeals redoubled its errors.

First, the court below asserted that to interpret the "willfully violates" language of subsection (d)(2) to require knowledge that the conduct violates the law would render superfluous a specific intent requirement in the companion subsection (d)(1). In 1984, Congress split § 186(d) into its present two subsections, retaining the "willfully violates" language in both subsections, but adding in subsection (d)(1) an additional intent requirement applicable solely to cases implicating the exceptions stated in § 186(c)(4)-(9). Thus, in addition to the "willfully violates" requirement, subsection (d)(1) also requires proof that the defendant committed the violation "with intent to benefit himself or to benefit other persons he knows are not permitted to receive a payment." The court below reasoned that:

> Congress had to have intended the term "willfully" as used in both sections 186(d)(1) and (d)(2) to require a finding of general intent; otherwise, the "intent to benefit" language in section 186(c)(1) would be superfluous, because a person who had the specific intent to violate [§ 186] would also necessarily intend to benefit himself or to influence a union official. [App. 31a-32a].

That "reasoning" is specious. Subsections (c)(4)-(9) of § 186—the provisions that trigger application of the criminal sanctions in subsection (d)(1), as opposed to those in subsection (d)(2)—establish numerous detailed requirements applicable to joint labor-management trust funds and to the check-off of union dues. An employer

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used in the federal criminal tax statutes [carves] out an exception to [*that*] traditional rule." *Id.* at 200.

and union may violate these requirements willfully—that is, with knowledge that the technical requirements of subsection (c) have not been satisfied—without having any intent to confer an improper benefit on anyone.[10]

Second, the court below stated:

> When Congress amended section 186(d) in 1984, it made no attempt to change the clear majority rule that "willfully" required a finding of only general intent. Because Congress left the willfulness requirement of former section 186(d) unchanged when it created section 186(d)(2) in 1984, we can only assume that Congress intended "willfully" to require a finding of only general intent. Congress is presumed to be knowledgeable about existing case law pertinent to any legislation it enacts, . . . and about the basic rules of statutory construction. [App. 34a-35a (citations and footnote omitted)].

But, there is nothing in the legislative history of the 1984 amendments to subsection (d) indicating that any of the *lower-court* rulings on "willfully violates" were brought to the attention of Congress.[11] "[I]n the absence of anything in the legislative history indicating that they were called to its attention, we should not assume that

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[10] For example, § 186(c)(5)(B) requires, *inter alia*, that "employees and employers [be] equally represented in the administration" of a qualified trust fund, and that the fund's annual audit be made available for inspection at the principal office of the fund. Employers and unions could "willfully" violate these requirements by establishing an unevenly-divided group of trustees or by not producing an annual audit (despite knowledge of these statutory requirements), without intending or realizing any improper benefit.

[11] The only discussion of "willfully violates" reflected in the 1984 legislative history is in the *Labor Management Racketeering Act of 1983: Hearings on S. 336 Before the Subcomm. on Labor of the Senate Comm. on Labor & Human Resources*, 98th Cong., 1st Sess. 148, 150 (1983) (Justice Department assured the Senate that "[a] 'willful' violation, especially when used in connection with crimes punished as felonies, ordinarily connotes a voluntary, intentional violation of a known legal duty").

Congress was aware of them." *Yates v. United States*, 354 U.S. 298, 310 (1957).[12] Indeed, even where, unlike here, Congress is aware of particular lower-court statutory interpretations, a failure to address those lower-court cases does not imply congressional acceptance of those rulings. *See, e.g., McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 130-31 & n.1, 132 n.8 (1988).

Finally, the court of appeals' characterization of the conduct here as "inherently wrong" (App. 36a)—like the Government's similar characterization in *Ratzlaf*, 114 S. Ct. at 660-62—cannot provide a basis for interpreting the "willfully violates" requirement in subsection (d)(2) as nothing more than a general intent requirement.

Whether the conduct of Phillips and Rich was in violation of § 186 turns on the interpretation of the exception to the prohibitions of § 186 that is stated in subsection (c)(1), covering payments by an employer "to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer." As we have shown, *supra* at 5-7, as of the time of the events in this case, it was widely understood that a pension credit arrangement such as that here is within the subsection (c)(1) exception. And, Phillips and Rich were not accused of providing any *quid pro quo* to USX in exchange for their pension credits. *See supra* at 4-5. Thus, the Eleventh Circuit's

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[12] *Accord Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 114 S. Ct. 1439, 1452-53, 1458-59 & n.8 (1994); *Rodriguez v. Compass Shipping Co.*, 451 U.S. 596, 615 (1981); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 336 n.7 (1971); *United States v. Powell*, 379 U.S. 48, 55 n.13 (1964). *See also, e.g., Boys Markets, Inc. v. Retail Clerks Union Local 770*, 398 U.S. 235, 241-42 (1970) (concerning Supreme Court statutory interpretations); *Girouard v. United States*, 328 U.S. 61, 69-70 (1946) (same); *Toucey v. New York Life Ins. Co.*, 314 U.S. 118, 139-40 n.10 (1941) (same); *Helvering* v. *Hallock*, 309 U.S. 106, 119-21 & n.7 (1940) (same).

"inherent[] wrong" characterization is a mischaracterization of the facts of this case.

Equally to the point, even on the court of appeals' reading of § 186(d)(2), the "willfully violates" requirement does not change from *case to case*. The question is what that requirement means in the range of cases covered by subsection (d)(2). That range includes cases that depend on close interpretation of the scope of the exceptions in subsection (c)(1), (2) and (3). Thus, not every act that may violate § 186 can be classified as "inherently wrong." Indeed, there would have been no reason for Congress to adopt the "willfully violates" requirement if Congress believed that all conduct in violation of § 186 is "inherently wrong." *See supra* at 18.

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In sum, the court below provided no basis for rejecting *Ratzlaf's* analytic approach or for interpreting the "willfully violates" language of § 186(d)(2) to mean something different from the "willfully violating" language in *Ratzlaf* and in the lower court cases cited *supra* at 16-17 n.8. The question thus raised as to whether "willfully violates" is a term of art with a uniform plain meaning is one with the widest ramifications that should be resolved by this Court.

2. The court of appeal's departure from *Ratzlaf* is also, as we have shown, a departure from the mai tream of cases interpreting the "willful violation" concept in the broad range of federal statutes employing that concept. That interpretive gulf is accentuated by the fact that the court below is not alone in giving this idiosyncratic meaning to the "willfully violates" requirement of § 186(d)(2). The Eleventh Circuit, through its decision here, joins four other circuits—the Second, Third, Sixth and Ninth Circuits—in so interpreting § 186(d)(2). The first in this line of cases, *United States v. Carter*, 311 F.2d 934, 943 (6th Cir.), *cert. denied*, 373 U.S. 915 (1963), succinctly summarizes the position adopted by the entire

line: "The word 'willful' even in criminal statutes, means no more than that the person charged with the duty knows what he is doing. It does not mean that, in addition, he must suppose that he is breaking the law." *See also United States v. Overton*, 470 F.2d, 761, 767 (2d Cir. 1972), *cert. denied*, 411 U.S. 909 (1973); *United States v. Ricciardi*, 357 F.2d 91, 100 (2d Cir.), *cert. denied*, 384 U.S. 942 (1966); *United States v. Pecora*, 484 F.2d 1289, 1294 (3d Cir. 1973); *United States v. Lanni*, 466 F.2d 1102, 1110 (3d Cir. 1972); *United States v. Bloch*, 696 F.2d 1213, 1216 (9th Cir. 1982).[13]

The Seventh Circuit, however, albeit in a wavering and uncertain fashion, has been the only circuit to resist this

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[13] This line of cases developed out of a statement in *United States v. Ryan*, 350 U.S. 299, 305 (1956), in which the Court referred, in passing, to § 186(d) as "a criminal provision, *malum prohibitum*, which outlaws all payments, with stated exceptions, between employer and representative." The only issue in *Ryan* was the definition of "union representative" in §§ 186(a), (b) and (c). The Court had no occasion to, and did not, address the meaning of the "willfully violates" requirement in subsection (d). Nor, of course, does classifying a crime as *"malum prohibitum"* settle the question as to the crime's *mens rea* requirement; the requisite state of mind in a *malum prohibitum* crime is established by the legislature that determines the elements of the crime.

Nevertheless, the Second Circuit in *Ricciardi*, 357 F.2d at 100, and the Third Circuit in *Lanni*, 466 F.2d at 1110, relied on the *Ryan dictum* as the basis for concluding that "willfully violates" in § 186(d) is simply a general intent requirement. And the Sixth Circuit in *Carter*, 311 F.2d at 943, relied on the Second Circuit's decision on remand in *Ryan*, approving, based on the *Ryan dictum*, a general intent instruction as satisfying the "willfully violates" element of § 186(d). *United States v. Ryan*, 232 F.2d 481, 483 (2d Cir. 1956) (*per curiam*). Later cases in the Second, Third, and Ninth Circuits simply followed the rationale set down in *Ricciardi*, *Lanni*, and *Carter*. *See Overton*, 470 F.2d at 767 (following *Ricciardi*); *Pecora*, 484 F.2d at 1294 (following *Lanni*); *Bloch*, 696 F.2d 1213 (following *Carter*).

So as not to be misunderstood, we add that the court below—in contrast to the Second, Third, Sixth and Ninth Circuits—did not rest its decision on the *Ryan dictum*. See App. 28a.

trend. *United States v. Incisco*, 292 F.2d 374, 380 (7th Cir.), *cert. denied*, 368 U.S. 920 (1961) ("We hold that the term 'wilfully violates' in Section 186(d) contemplates proof of an awareness of the restrictions of that section or a reckless disregard for that section."). *Inciso* was recently reaffirmed in *United States v. Papia*, 910 F.2d 1357, 1362 (7th Cir. 1990) ("[t]his circuit's formulation requir[es] an awareness of or reckless disregard for § 186(d)'s restrictions," citing *Inciso*). In two cases between *Inciso* and *Papia*, however, the Seventh Circuit quoted the standard of *Inciso* and purported to follow that standard, but approved trial court jury instructions that did not in fact satisfy the *Inciso* standard. *United States v. Kaye*, 556 F.2d 855, 863 (7th Cir.), *cert. denied*, 434 U.S. 921 (1977); *United States v. Keegan*, 331 F.2d 257, 262 (7th Cir.), *cert. denied*, 368 U.S. 920 (1964).

The most straight forward comparison of the opinion in *Carter*, 311 F.2d at 943, and this Court's opinion in *Ratzlaf* (discussed *supra* at 13-15) demonstrates that the majority court of appeals' rule on "willfully violates" in § 186(d)(2) is 180 degrees removed from this Court's general plain meaning interpretation of the phrase. And, as we have shown, *supra* at 18-23, the various rationales for the lower court majority rule on § 186(d)(2) cannot withstand a moment's reasoned scrutiny.

Given the breadth of application of § 186(d)(2) and its importance in the federal scheme for regulating labor-management relations, this anomalous reading of § 186 (d)(2), standing alone, requires this Court's consideration.

CONCLUSION

For the reasons stated above, this Court should grant this petition for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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